

UNIT 83 TERMINATION

(Formerly Unit 76)

_____ has satisfactorily completed on-the-job training in the Part or Parts of this Unit specified below.

Certification for Part A: Determine Whether to Terminate for Convenience or Default

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| Duty | Determine whether to terminate. |
| Conditions | Given contracts, evidence of performance problems, show cause or cure notices, and requests for termination from the requiring activity and/or contractor. |
| Overall Standard(s) | Terminate for convenience if funds are insufficient, the requirement is no longer needed, or the quantity needed has been reduced. Also terminate for convenience if there has been a radical change in the requirement that is beyond the contractor's expertise. Terminate for default when there is no other alternative for obtaining performance, given the current contractor's problems and deficiencies, and the Government has a sustainable case for default. |

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| Evaluator | Name | _____ |
| | Title | _____ |
| | Date | _____ |

Certification for Part B: Terminating for Convenience

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| Duty | Terminate for convenience. |
| Conditions | Given the contract and a decision to terminate for convenience. |
| Overall Standard(s) | Meet the requirement as amended by the requiring activity and negotiate a settlement that returns the contractor whole for his/her costs sustained in meeting the requirement to the point of cancellation. |

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| Evaluator | Name | _____ |
| | Title | _____ |
| | Date | _____ |

UNIT 83 TERMINATION

Certification for Part C: Terminating for Default

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| Duty | Terminate for default. |
| Conditions | Given the contract and a decision to terminate for default. |
| Overall Standard(s) | Establish a case for the default that meets the Government's legal and factual burdens of proof and demonstrates that the default termination is the best way of meeting the requirement. Reinstate the contract if the contractor provides good reason for believing that reinstatement is the best way of meeting the requirement. Reprocure and demand recovery of all costs for which the contractor is liable. |
| Evaluator | Name _____ |
| | Title _____ |
| | Date _____ |

Terminating Contracts Under Part 12



The Government retains the right to terminate both for cause and convenience under FAR 52.212-4, Contract Terms and Conditions - Commercial Items. Contracting officers may continue to use Part 49 as guidance ONLY to the extent that Part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4. [§12.403, FAC 90-32, Case 94-970]

UNIT 83 TERMINATION

| DOCUMENTATION OF OJT ASSIGNMENT(S) |
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| Description of Assignment: |
| Evaluation: |
| Completion Date: |

UNIT 83 TERMINATION

| DOCUMENTATION OF OJT ASSIGNMENT(S) |
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| Completion Date: |

As needed, insert additional pages to record OJT assignments.

UNIT 83 TERMINATION

Policies

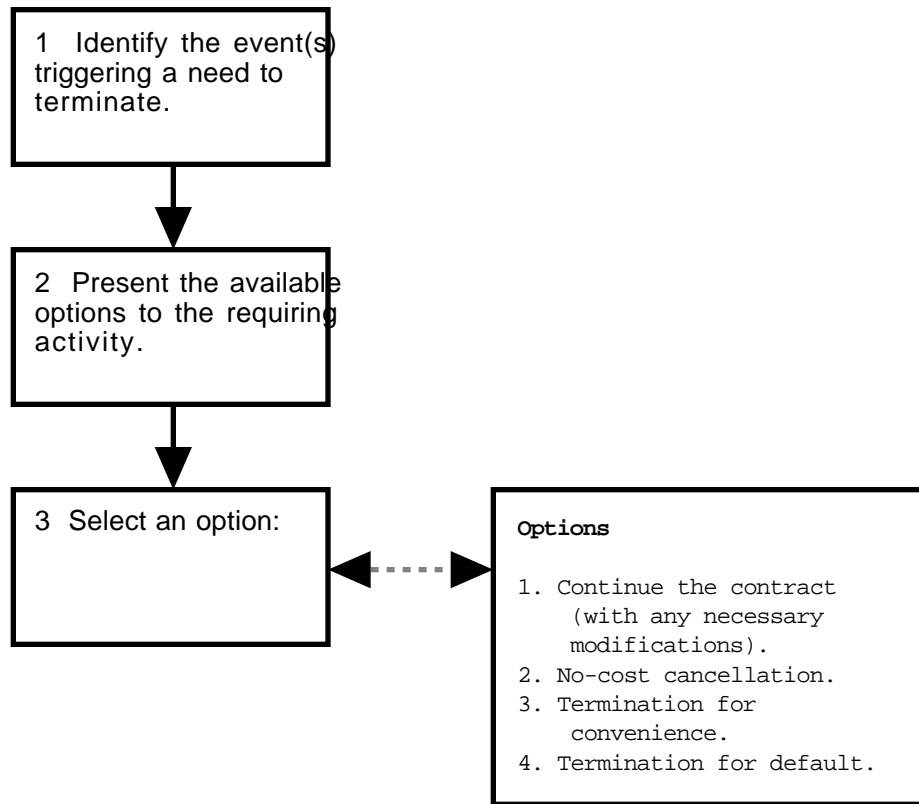
| <i>FAR</i> | <i>Agency Suppl.</i> | <i>Subject</i> |
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| 8.405-4 through 405-6 | | Terminating FSS orders. |
| 9.405-1 | | Continuation of a current contract with a debarred or suspended firm. |
| 12.403 | | Terminating contracts for commercial items. |
| 19.812 | | Requirement to terminate 8(a) contracts for convenience when the 8(a) concern transfers ownership or control of the firm (unless SBA waives the requirement). |
| 32.109 | | Financing of contractor costs for termination. |
| 49 | | General FAR policies on termination. |
| 52.212-4(l) & (m) | | Termination of contracts for commercial items. |
| 52.249-1 52.249-2 52.249-4 52.249-5 | | Termination for convenience. |
| 52.249-6 | | Termination (Cost-Reimbursement). |
| 52.249-8 52.249-9 | | Default |
| 52.249-12 | | Termination (Personal Services). |

Other KSA's

1. Commercial law, accounting, and quantitative analysis.

Other Policies and References (Annotate As Necessary):

Determine Whether to Terminate for Convenience or Default



UNIT 83 TERMINATION

Part A: Determine Whether to Terminate for Convenience or Default

Tasks

Related Standards

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| <p>1. Identify the event(s) triggering a need to terminate.</p> <ul style="list-style-type: none"> • Issuance of cure or show cause notice, when the contractor has failed to show the Government that the requirement will be fulfilled per the contract's terms. • Requiring activity signals that: <ul style="list-style-type: none"> - Need no longer exists or has already been fully satisfied short of the required quantity. - Funds not available. - There has been a radical change in the requirement that goes beyond the contractor's expertise. | |
| <p>2. Present the available alternatives to the requiring activity, along with pros and cons of each alternative.</p> <p>Alternatives:</p> <ul style="list-style-type: none"> • Continue the present contract, through such means as: <ul style="list-style-type: none"> - Permitting performance by the contractor, surety, or guarantor under a revised delivery schedule. - Permitting the contractor to subcontract with an acceptable third party or establish other business arrangements with such party. • A no-cost cancellation. • Termination for Convenience (TFC). • Termination for Cause or Default (TFD). | <p>A2 and A3. Recommend the alternative that will have the least impact on the Government's requirements (per this contract and future contracts), delivery schedule, and overall cost.</p> <p>Continue the present contract when the requirement can be most cost-effectively accomplished under the present contract (e.g., when the price of the undelivered balance of the contract is less than \$5,000).</p> <p>If the termination is pursuant to a unilateral purchase order, issue a no-cost cancellation if the contractor has not yet accepted the Government's offer (i.e., no letter of acceptance; no performance of work).</p> <p>If the offer has been made and accepted, only issue a no-cost cancellation when:</p> <ul style="list-style-type: none"> • The supply or service can readily be obtained elsewhere, • A no-cost settlement is acceptable to the contractor, • Government property had not been furnished to the contractor, and • There are no outstanding payments, debts due the Government, or other contractor obligations. <p>Terminate for convenience when the requirement is no longer necessary or, if it could be more cost-effectively met by re-procuring, there is no sustainable basis to terminate for cause or default given the tests in Appendix I.</p> |

UNIT 83 TERMINATION

Part A: Determine Whether to Terminate for Convenience or Default

Tasks

Related Standards

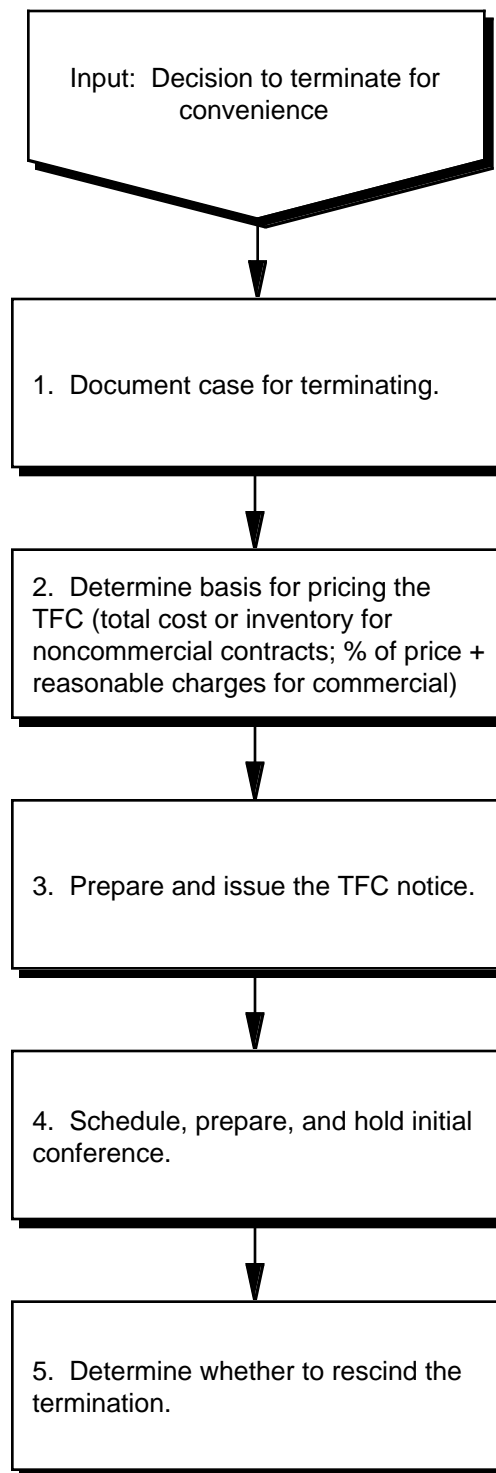
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| 3. Recommend termination for convenience or cause/default. | Terminate for cause/default if the Government's case meets the tests in Appendix I. |
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The Government may terminate for cause under FAR 52.212-4:

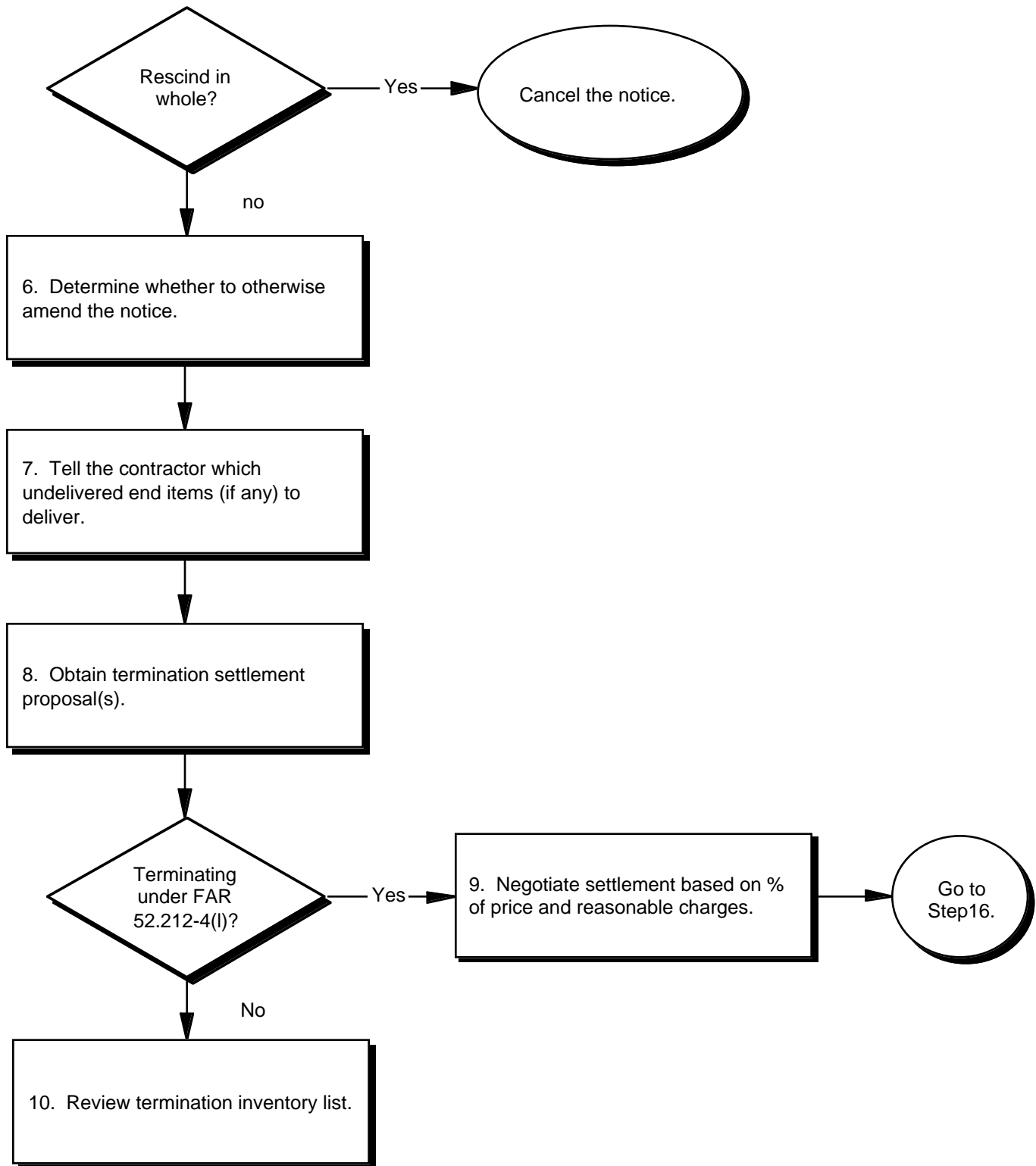
- In the event of any default by the Contractor, or
- If the Contractor fails to comply with any contract terms and conditions, or
- If the Contractor fails to provide the Government, upon request, with adequate assurances of future performance.

These are basically the same three causes in FAR Part 49 default clauses. [§52.212-4(m), FAC 90-32, Case 94-970]



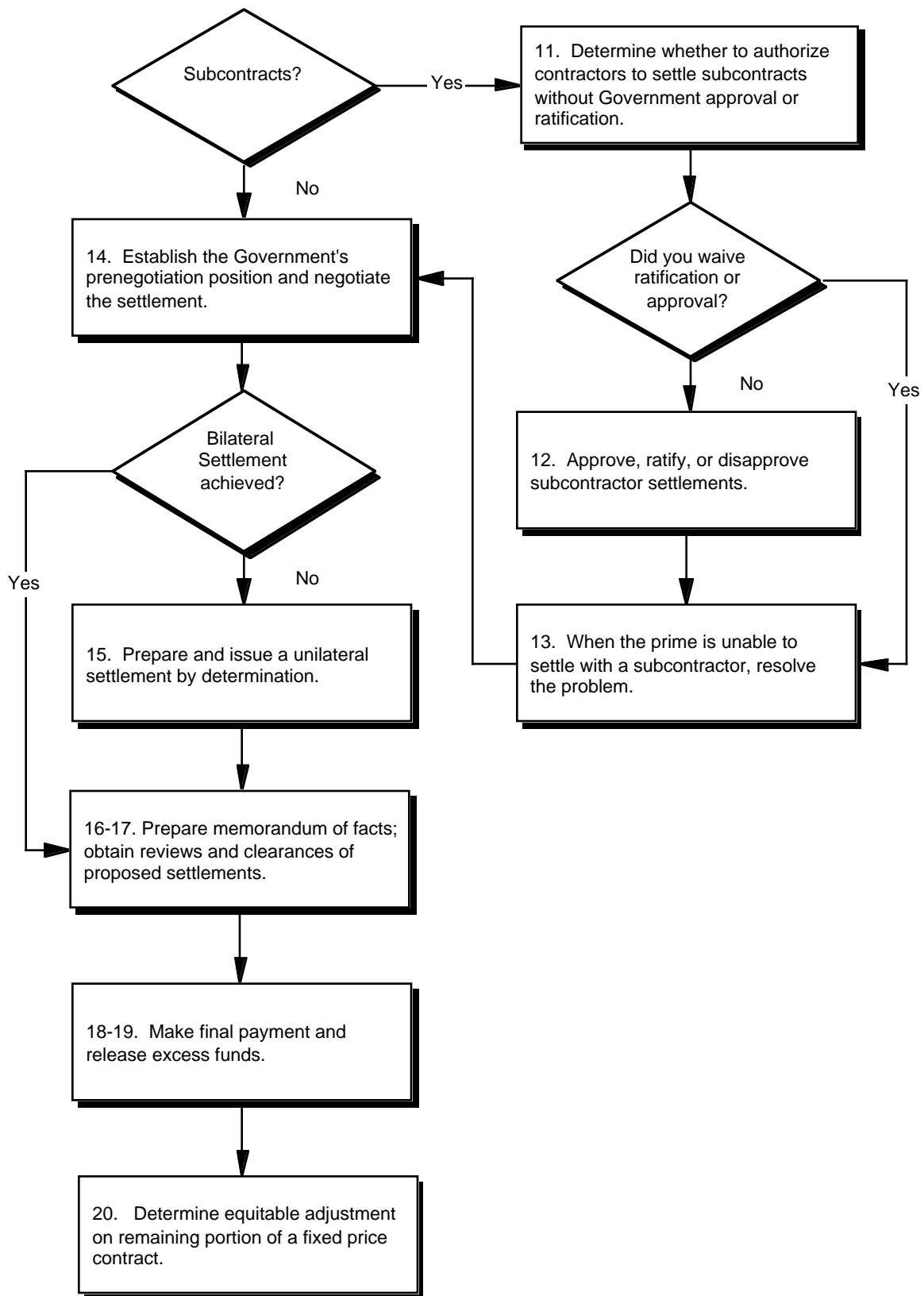
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UNIT 83 TERMINATION

Part B: Terminating for Convenience

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| <p>1. Document the case for terminating.</p> <ul style="list-style-type: none"> • No longer a need for the requirement. • Funding for the contract is eliminated or curtailed. • A Board or court has overturned the Cause/Default termination. • Impossibility of performance (specifications, acceptance delivery, etc.). • Other. | |
| <p>2. If settling a fixed price contract for convenience, determine the basis for settlement.</p> <ul style="list-style-type: none"> • Inventory. • Total cost. • Percentage of price. | <p>B2. Plan to settle on “percentage of price” if the contract includes the clause at FAR 52.212-4(l).</p> <p>Determine whether to use the inventory or total cost basis by correctly applying the factors in FAR 49.206-2.</p> |

Part 12 Terminations For Convenience (NEW)

 FAR §52.212-4, *Contract Terms and Conditions - Commercial Items*, establishes a new basis for convenience termination settlements:

- Percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, PLUS
- Reasonable charges that the Contractor can demonstrate — to the satisfaction of the Government using its standard record keeping system — have resulted from the termination.

HOWEVER, do NOT pay the contractor for any work performed or costs incurred “which reasonably could have been avoided”.

For this purpose, the Contractor shall not be required to comply with the cost accounting standards nor with any contract cost principle. This paragraph does not give the Government any right to audit the Contractor’s records. [§12.403 & 52.212-4(l), FAC 90-32, Case 94-970

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| <p>3. Prepare and issue the TFC notice.</p> <ul style="list-style-type: none"> • Specify the extent (partial or complete), the effective date of TFC, and any other instructions. • Send copies to the contractor, the contract administration activity (if any), and to any known assignee, guarantor, or surety of the contractor. | <p>B3. Prepare and issue the notice as prescribed in 49.102 and 49.601. Provide copies to appropriate offices, including to the requiring activity and finance.</p> <p>[Question: To what extent (if any) would a contracting officer modify the standard FAR 49.601 TFC notice when terminating under FAR 52.212-4????]</p> |
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UNIT 83 TERMINATION

Part B: Terminating for Convenience

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| <p>4. Schedule, prepare, and conduct the initial conference with the prime contractor.</p> <p>Potential topics:</p> <ul style="list-style-type: none"> • Reasons for terminating. • Extent of the termination, point at which work is stopped, and the status of plans, drawings, and data (if any) that would have been delivered had the contract been completed. • Status of any continuing work. • Obligation of the contractor to terminate subcontracts and general principles for settling with subcontractors. • Principles and procedures for settling the termination, including the contractor's related obligations under the termination clause. • Form(s) for settlement proposals. • Any requirement for interim financing in the nature of partial payments. • Tentative time schedule for submitting and negotiating settlement proposals and related schedules (e.g., termination inventory; accounting information schedules). • Actions taken by the contractor to minimize impact upon employees affected adversely by the termination. • Any counterproposal by the contractor to modify the contract rather than terminate it. | <p>B4. Correctly explain duties of the prime contractor under FAR 49.104. Conduct the conference as provided in FAR 49.105(c).</p> <p>Correctly identify relevant topics when terminating noncommercial contracts for convenience, including such additional topics as:</p> <ul style="list-style-type: none"> • Names of subcontractors; issuance dates of subcontractor termination notices. • Contractor personnel responsible for settling with subcontractors; methods being used. • Arrangements for the transfer of title and delivery to the Government of any material required by the Government. • Principles and procedures for (1) preparing termination inventory schedules and (2) protecting, preserving, and disposing the inventories. • Instructions in FAR 49.206 for preparing and submitting cost-based settlement proposals. • For cost-type contracts, instructions in FAR 49.3 for preparing final settlement proposals and vouchers. • Contractor accounting practices. • Preparing the SF 1439. • Accounting review of settlement proposals. • Requirements, where applicable, to furnish certified cost or pricing data. <p>Correctly identify relevant topics when terminating contracts for convenience under FAR 52.212-4(l) , including such additional topics as:</p> <ul style="list-style-type: none"> • Price-based settlements. • Identifying other reasonable charges based on the contractor's "standard record keeping system". <p>[Question: What topics are relevant when terminating under FAR 52.212-4(l); which are irrelevant????]</p> |
| <p>5. Determine whether to rescind the termination in whole or in part and, if so, prepare an amendment of the termination notice to rescind.</p> <p>Basis for rescinding:</p> <ul style="list-style-type: none"> • The contractor's counterproposal or • Notice from the requiring activity that the requirement has been restored or funding resumed. | <p>B5. Rescind the notice when:</p> <ul style="list-style-type: none"> • Terminated items had been completed or shipped before the contractor's receipt of the notice, or • The contractor has consented in writing to reinstatement, the terminated items are still required, and reinstatement would be advantageous to the Government. |

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Part B: Terminating for Convenience

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| 6. Determine whether to otherwise amend the notice of termination. | B6. Amend the notice to correct nonsubstantive mistakes or add supplemental data or instructions. |
| 7. Determine which undelivered, accepted end items are to be delivered under the contract. <ul style="list-style-type: none">• After the termination date, arrange for inspection of all completed, undelivered end items.• Determine which completed and accepted undelivered end items will nonetheless not be delivered under the contract. | B7. With respect to fixed price contracts being terminated for convenience, authorize invoicing and payment of end items delivered under the contract and instruct the contractor not to include payment for them in the settlement proposal. |
| 8. Obtain contractor's termination settlement proposal and, where appropriate, the settlement proposals of subcontractors. | |
| 9. For commercial contracts, negotiate settlement based on % of price and reasonable charges as prescribed by FAR 52.212-4(l). | B9. (See Units on Cost and Price Analysis). |

Part 12 Terminations For Convenience (NEW)



FAR §52.212-4, *Contract Terms and Conditions - Commercial Items*, establishes a new basis for convenience termination settlements:

- Percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, PLUS
- Reasonable charges that the Contractor can demonstrate — to the satisfaction of the Government using its standard record keeping system — have resulted from the termination.

HOWEVER, do NOT pay the contractor for any work performed or costs incurred “which reasonably could have been avoided”.

For this purpose, the Contractor shall not be required to comply with the cost accounting standards nor with any contract cost principle. This paragraph does not give the Government any right to audit the Contractor's records. [§12.403 & 52.212-4(l), FAC 90-32, Case 94-970

UNIT 83 TERMINATION

Part B: Terminating for Convenience

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| <p>10. Review any termination inventory list.</p> <p>[Question: Is this step required or ever appropriate when terminating under FAR 52.212-4(1)????]</p> | <p>B10. Obtain support from Federal property specialists to:</p> <ul style="list-style-type: none"> • Verify existence of the termination inventory. • Determine qualitative and quantitative allocability. • Make recommendations concerning servability. • Undertake necessary screening and redistribution. • Assist the contractor in accomplishing other disposition. |
| <p>11. Determine whether to authorize contractors to settle subcontracts terminated in whole or in part without approval or ratification.</p> <p>[Question: Is this step required or ever appropriate when terminating under FAR 52.212-4(1)????]</p> | <p>B11. Provide such authorization under the conditions prescribed in FAR 49.108-4.</p> |
| <p>12. Approve, ratify, or disapprove subcontractor settlements.</p> <ul style="list-style-type: none"> • Obtain copies of subcontractor settlements and supporting data. • For noncommercial contracts, obtain audits and technical reviews of subcontractor settlements. • Prepare a position on the whether the settlements were arrived at in good faith, are reasonable in amount, and are properly allocable to the terminated portion of the contract. <p>[Question: Is this step required or ever appropriate when terminating under FAR 52.212-4(1)????]</p> | <p>B12. Examine subcontractor settlement proposals as prescribed in FAR 49.108-3. Obtain audits of subcontractor settlements as prescribed in FAR 49.107.</p> <p>[Question: Is this step required or ever appropriate when terminating under FAR 52.212-4(1)????]</p> |
| <p>13. When the prime contractor is unable to reach an acceptable settlement with a subcontractor, resolve the problem.</p> <p>Alternatives:</p> <ul style="list-style-type: none"> • Provide assistance in settling the subcontractor. • Directly settle and pay the subcontractor. • Except the subcontractor settlement proposal from negotiations with the prime contractor on the overall settlement proposal and settle with the prime. <p>[Question: Is this step required or ever appropriate when terminating under FAR 52.212-4(1)????]</p> | <p>B13. Negotiate a final settlement which excepts a subcontractor settlement proposal as provided in FAR 48.108-6. Provide assistance in settling the subcontract as provided in FAR 49.108-7. Direct the contractor to assign to the Government all rights, titles, and interest under any subcontract and proceed to settle directly with a subcontractor as provided in FAR 49.108-8.</p> |

UNIT 83 TERMINATION

Part B: Terminating for Convenience

14. For noncommercial contracts, establish the Government's prenegotiation position on the settlement and negotiate.

- Obtain technical review and final audit of the settlement proposal.
- Determine whether to authorize partial payment against the contractor's settlement proposal before reaching a final settlement.
 - Calculate the amount to pay.
 - Identify the payee.
 - Obtain security.
 - Certify and approve the partial payment.
- Prepare the Government's position on all outstanding elements of cost (per Unit 40).
- When a subcontractor has obtained a final judgement against the prime contractor or obtained an arbitration award, determine the extent to which the judgement or award will be incorporated in the settlement between the prime contractor and the Government.
- Negotiate (per Units 44 and 45) settlement of outstanding costs.
 - One tactic: Mutually create and run down a check list of cost elements.
 - Focus on 3-4 most critical cost elements.
- Determine whether to reach a partial settlement when a bilateral agreement cannot be reached on all outstanding elements of cost.
- Given indicators of fraud or other criminal conduct, determine whether to discontinue negotiations and report the contractor.
- Modify contract (per Unit 76) to include the settlement agreement.
- Obtain release of claims.

B14. Obtain audits of prime contractor settlement proposals when required under FAR 49.107. Incorporates judgements or awards as prescribed in FAR 29.108-5. The final settlement should conform to FAR part 49.109, in that it should:

- Cover any setoffs that the Government has against the contractor that may be applied against the terminated contract.
- Cover all settlement proposals of subcontractors or identifies those which have been excepted from the agreement and reserved for separate settlement.
- Include any reservation prescribed in FAR 49.109-2 and 49.103-2 and includes any appropriate deduction from the amount otherwise due the contractor for property for which the contractor cannot account.
- Take the form of a no cost settlement when the contractor has not incurred or is willing to waive costs for the terminated portion of the contract and no amounts are due the Government under the contract.

Determinations on partial payments should conform to FAR 49.112-1. Only reach a partial settlement under the conditions specified in FAR 49.109-5.

With respect to fixed price contracts which are terminated for convenience, apply the principles in FAR subpart 49.2 in determining the settlement amount (including any deductions under 49.204). For incentive contracts, the settlement should conform to FAR 49.115.

With respect to cost reimbursement contracts which are terminated for convenience, apply the procedures and principles in FAR subpart 49.3 in determining the need for an audit, determining indirect costs, reaching a final settlement on costs, adjusting the fee, and partially terminating the contract.

UNIT 83 TERMINATION

Part B: Terminating for Convenience

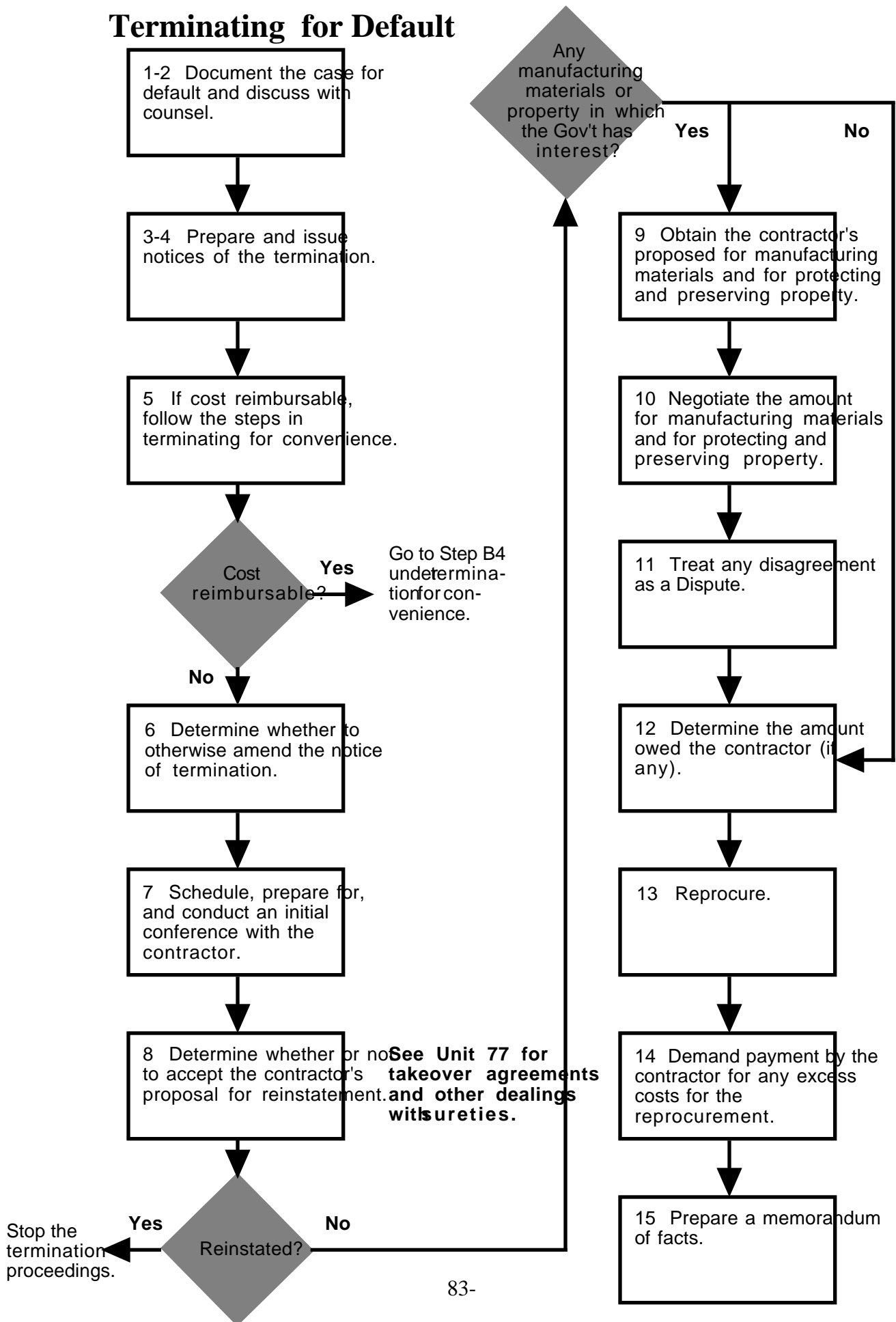
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| <p>15. Prepare and issue a settlement by determination.</p> <ul style="list-style-type: none"> • Provide notice to the contractor of intent to settle by determination. • Review any data provided by the contractor. • Request the contractor to submit any additional documentation and data bearing on the determination. • Request any necessary or required accountings, investigations, and audits. • Determine the need for factfinding conferences with the contractor, Government personnel, independent experts, and persons who have submitted affidavits or reports. • Conduct any needed factfinding conferences (per Unit 43). • Determine the amount due (by applying techniques from Unit 40). • Transmit a copy of the determination to the contractor, including a statement that the determination is a final decision which may be appealed under the disputes clause under the conditions cited at FAR 49.109-7(f). • Return books of account, together with other original papers and documents, to the contractor. <p>[Question: Is this step required or ever appropriate when terminating under FAR 52.212-4(l)????]</p> | <p>B15. Settle by determination when:</p> <ul style="list-style-type: none"> • The Government and contractor cannot reach a bilateral agreement on all elements of outstanding cost. • The contractor has not submitted a settlement proposal within the period stipulated in the termination clause. <p>Provide at least 15 days advance notice by certified mail. The determination should conform to FAR 49.107-7. Transmit the determination by a method that provides evidence of receipt. Return books of accounts and other such documents to the contractor as provided in FAR 49.107(e).</p> <p>For fixed price contracts, apply the principles in subpart 49.2 in determining the settlement amount (including any deductions under FAR 49.204). For cost reimbursement contracts, apply the procedures and principles in FAR subpart 49.3 in determining the need for an audit, determining indirect costs, reaching a final settlement on costs, adjusting the fee, and partially terminating the contract.</p> |
| <p>16. Prepare a memorandum of facts.</p> <ul style="list-style-type: none"> • Effective date of termination and summary of overall position . • Nature of requirement. • Status of requirement and reasons for termination. • Outstanding costs and proposed settlement of same. • Explanation of matters involving differences and doubtful questions settled by agreement and the factors considered. • Rationale for proposed settlement . | <p>B16. When settlement was by determination, retain all written evidence and other data relied on in making the determination, except that copies of original books of account need not be made. If the settlement was negotiated on an item by item basis, specify the factors considered for each item. If the settlement was on an overall price (plus reasonable charges) or lump-sum basis, support the total amount of the recommended settlement in reasonable detail.</p> |
| <p>17. Obtain reviews and clearances of the proposed settlements.</p> | |

UNIT 83 TERMINATION

Part B: Terminating for Convenience

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| 18. Make final payment or, where the partial payment was in excess of the final amount of the settlement, demand repayment. | B18. Accomplish final payment or repayment in compliance with FAR 49.112-1(g) and 49.112-2. |
| 19. Calculate and release excess funds. | |
| 20. Given a contractor's request for an equitable adjustment on the remainder of a fixed price contract which had been partially terminated for convenience, determine the equitable adjustment. | B20. Comply with FAR 49.208 in determining the equitable adjustment. |

Terminating for Default



UNIT 83 TERMINATION

Part C: Terminating for Default

Tasks

Related Standards

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| 1. Document the case for default, including the cure or show cause notice issued (per Units 59 and 60). See Appendix 1 for default tests. | |
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Cure notices are still required prior to terminating a contract for a reason other than late delivery. Show cause notices are not required but are permitted. [§12.403, FAC 90-32, Case 94-970]

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| 2. Discuss case with counsel (preliminary review); identify additional facts necessary to strengthen case. | |
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UNIT 83 TERMINATION

Part C: Terminating for Default

Tasks

Related Standards

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| <p>3. Prepare and issue termination notice.</p> <p>When terminating for default, state:</p> <ul style="list-style-type: none"> • The contract number and date. • Effective date of the termination. • The specific portion terminated (if partial). • Acts or omissions constituting the default. • That the contractor's right to proceed further under the contract (or the specified portion of the contract) is terminated. • That the terminated supplies or services may be reprocured against the contractor's account and that the contractor will be held liable for any excess costs. • The notice of termination constitutes a decision that failure to perform is not excusable and that the contractor may appeal that decision under the Disputes clause. • That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs. • That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause. • Specific instructions to the contractor. For example: <ul style="list-style-type: none"> - Stop using tooling. - Terminate any and all subcontracts by X date and Y hour. - Cease to book charges immediately. - Follow these steps [specify same] to minimize the impact on personnel if the termination, together with all other outstanding terminations, will result in a significant reduction in the contractor's work force. | <p>C3. If terminating for default, prepare and distribute the notice as prescribed in FAR 49.102, 49.402-3(g), 49.402-3(h), and 49.601.</p> <p>If terminating for cause under FAR 52.212-4(m), prepare the notice as prescribed in FAR 12.403. At minimum:</p> <ul style="list-style-type: none"> • Indicate the contract is terminated for cause, • Specify the reasons for the termination, • Indicate which remedies the Government intends to seek or provide a date by which the Government will inform the contractor of the remedy, and • State that the notice constitutes a final decision of the contracting officer and that the contractor has the right to appeal under the Disputes clause (see 33.211). |
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Contracting officers must terminate for cause by sending a written notice to the contractor. At a minimum, this notification shall—

- Indicate the contract is terminated for cause,
- Specify the reasons for the termination,
- Indicate which remedies the Government intends to seek or provide a date by which the Government will inform the contractor of the remedy, and
- State that the notice constitutes a final decision of the contracting officer and that the contractor has the right to appeal under the Disputes clause (see 33.211). [§12.403, FAC 90-32, Case 94-970]

UNIT 83 TERMINATION

Part C: Terminating for Default

Tasks

Related Standards

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| 4. When default termination is issued, inform the program office, finance office, Inspector General, etc. | |
| 5. If the contract is cost reimbursable, follow the steps in terminating for convenience, except: <ul style="list-style-type: none"> Do not allow the costs of preparing the contractor's settlement proposal. Reduce the total fee as provided in the clause. | C5. When terminating a cost reimbursement contract for default, comply with FAR 49.403. |
| 6. Determine whether to otherwise amend the notice of termination. | C6. Amend the notice to correct nonsubstantive mistakes or add supplemental data or instructions. |
| 7. Schedule, prepare for, and conduct an initial conference with the prime contractor (and, where appropriate and after consultation with the prime contractor, major subcontractors). Potential topics: <ul style="list-style-type: none"> Contractor questions about the default (be willing to take the contractor through your case). Extent of the termination, the point at which work is stopped, and the status of any plans, drawings, and information that would have been delivered under the completed contract. Status of any continuing work (if a partial termination). Obligation of the contractor to terminate subcontracts. Arrangements for the transfer of title and delivery to the Government of any completed supplies and manufacturing materials (i.e., partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights) that the termination notice has directed be delivered to the Government. General principles and procedures to be followed in the protection and preservation of any property in the Contractor's possession in which the Government has an interest. | C7. Only conduct such a conference when terminating a fixed price contract for default when necessary. Provide accurate information on the contractor's duties under FAR 49.104 and the specific terms and conditions of the contract. |

UNIT 83 TERMINATION

Part C: Terminating for Default

Tasks

Related Standards


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| <ul style="list-style-type: none"> • Submission of proposals on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. • Tentative time schedule for the negotiation of an agreement on such proposals. • Actions taken by the contractor to minimize impact upon employees affected adversely by the termination. • Any counterproposal by the contractor to modify the contract rather than terminate it. | |
| <p>8. Determine whether or not to accept the contractor's counterproposal (if any) for reinstating the contract in whole or in part and, if so, prepare an amendment of the termination notice to rescind.</p> | <p>C8. Rescind the notice when the contractor has consented in writing to reinstatement, the terminated items are still required, and reinstatement would be advantageous to the Government.</p> |
| <p>9. Obtain the contractor's proposal on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property.</p> | |
| <p>10. Negotiate an agreement on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property.</p> | |
| <p>11. If no agreement is reached on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property, treat the disagreement as a Dispute under the Disputes Clause (per Unit 81).</p> | |
| <p>12. Determine the amount owed the contractor (if any).</p> | <p>C12. Correctly factor in:</p> <ul style="list-style-type: none"> • The contract price for completed deliverables that have been delivered and accepted. • The negotiated agreement on payment for manufacturing materials that have been delivered and accepted and for the protection and preservation of the property. • Deductions necessary to protect the Government against loss because of outstanding liens or claims of former lien holders. |
| <p>13. Select and apply one or more available remedies.</p> | <p>C13. Accurately identify the applicable remedy or remedies that best match the circumstances of the acquisition.</p> |

UNIT 83 TERMINATION

Part C: Terminating for Default

Tasks

Related Standards

 FAR §52.212-4(m) states that, “in the event of termination for cause, the Government shall not be liable to the Contractor for any amount, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law.” §12.403 further stipulates that “the Government’s rights after a termination for cause shall include all the remedies available to any buyer in the market place” and that the “preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess repurchase costs together with any incidental or consequential damages incurred because of the termination”. In commercial law, this remedy is known as “cover” (UCC §2-712). [§12.403 and §52.212-4(m), FAC 90-32, Case 94-970]

Under the UCC, other buyer’s rights and remedies include the following.

- Cancel and, with notice, rescind (UCC §2-711).
- Sue for breach of contract (UCC §2-713) if the seller repudiates the contract or fails to deliver (in which case the measure of recovery is the difference between the contract price and the market price of the goods at the time that the buyer learned of the breach). In this case, there is no repurchase -- the buyer does without the deliverable.
- Exercise the right of replevin (UCC §2-716(3)) if the seller has the deliverable but refuses to make delivery (and the buyer cannot repurchase from another source).
- Sue for specific performance (UCC §2-715(1)) if the seller refuses to perform and the buyer cannot repurchase the deliverable from any other source.

Although the FAR does not specifically address this point, the Government will probably continue to have an obligation to mitigate or reduce the damages suffered (e.g., to promptly repurchase and at a fair and reasonable price). This is a principle common to both Government and commercial contract law.

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| 14. If a selected remedy, repurchase. | C14. Comply with the provisions of FAR 49.402-6 when repurchasing. If the contract was terminated for cause under FAR 52.212-4, correctly compute excess repurchase costs and incidental or consequential damages incurred because of the termination. Correctly mitigate or reduce damages to the Government (e.g., by promptly repurchasing and at a fair and reasonable price). Correctly identify any other differences when repurchasing under FAR Part 12 vs. under FAR 49.402-6. |
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UNIT 83 TERMINATION

Part C: Terminating for Default

Tasks

Related Standards

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| 14. Demand payment by the contractor for any excess costs for the reprocurement of the supplies or services and for any other amount owed the Government. | C14. Calculate reprocurement costs per FAR 49.402-6. Calculate other damages (including administrative costs) per FAR 49.402-7. |
| 15. Prepare a memorandum of facts. Include: <ul style="list-style-type: none">• A copy of the termination notice.• The documentation of the case for default.• Agreements negotiated with the contractor.• The reprocurement file.• Recovery of costs from the original contractor. | |

UNIT 76 TERMINATION

Appendix 1

Default Tests

- I. Terms and conditions of the contract and applicable laws and regulations at issue:
 - What was breached?
 - Do the facts support a finding that the contractor has breached the contract?
 - Does the breach, on its face, merit the severe remedy of default?
 - Has the Government met procedural requirements for proceeding with a default termination notice (e.g., issued any required notices)?
 - Has the decision to default been made on the merits (i.e., free of outside influence)?
 - Has the requiring activity proposed any change in the material requirement for the procurement (which would thereby undermine the Government's case for a default termination)?
- II. Mitigating circumstances:
 - Does the contractor have a good case that he/she is not at fault, based on such grounds as—
 - Impossibility of performance.
 - Excusable delay.
 - Breach by the Government.
 - Does the the contractor have a good case for contending that a default would be arbitrary, capricious, or retaliatory?
- III. Impact on the requirement if the contractor is terminated for default:
 - Have alternatives to Termination for Default been considered (FAR 49.402-4)?
 - Is there any reasonable probability of meeting the requirement by continuing to work with the present contractor? If so, what would be the additional time and cost of continuing to work with present contractor?
 - Is the deliverable available from other sources and, if yes, what would be the reprocurement lead time?
 - What is the urgency of the need for the deliverable?
 - What is the potential for recovering the Government's current investment in the contractor (e.g., any Government guaranteed loan(s), unliquidated progress payments or advance payments) and reprocurement costs? (Can the contractor afford to repay or would he/she go bankrupt?)
- IV. Impact on other requirements:
 - Is the contractor essential to other critical work of the Government?
 - Will the contractor be able to meet other critical Government requirements if terminated for default on the instant contract(s)?